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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ, *Petitioner*,

v.

ASTOL CALERO TOLEDO, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR PETITIONER

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On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The unreported opinion and judgment of the United States District Court for the District of Puerto Rico, dated October 23, 1978, dismissing petitioner's complaint against the respondent Astol Calero Toledo, are set forth at page 14 of the Appendix. The opinion of the United States Court of Appeals for the First Circuit affirming the dismissal is reported at 602 F. 2d 1018 and is set forth at Page 17 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on August 7, 1979, and a petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND OTHER AUTHORITIES

I. United States Constitution, Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. United States Constitution, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceedings for redress.

IV. Federal Rules of Civil Procedure, Rule 8(c):

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and

satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

V. Puerto Rico Police Act of 1974, Act No. 26 of 1974, 25 L.P.R.A. §1007

Regulations

The Superintendent is empowered to determine by regulations the organization and administration of the Police, the duties, responsibilities and behavior of its members and any other matter necessary for the functioning of the Corps. The regulations shall be submitted to the Governor and once he approves them, they shall have the force of law and take effect sixty (60) days after approval. The Superintendent shall be authorized to introduce amendments to the regulations following the same standards and procedure previously established for the approval thereof.

Until such time as the regulations provided herein take effect, the Police shall be governed by the Regulations in force under the provisions of Act No. 77 of June 22, 1956, except as to such provisions that are incompatible with this chapter.

The Superintendent shall determine in the Regulations the rank or position of the heads of divisions, zones, districts and precincts.

The Superintendent shall provide by Regulations the order to succession in the case of absence or disability, death or temporary vacancy—Aug 22, 1974, No. 26, Part 2, p. 671 §7, eff. 90 days after August 22, 1974.

VI. Puerto Rico Police Act of 1974, Act No. 26 of 1974, 25 L.P.R.A. §1014

Procedure for serious shortcomings

(a) The investigation record of every serious charge shall include a complete report of the imputations made against the respondent member or members of the Force. The investigation procedure and remittance of the record shall be made without unnecessary delay. The Regulations shall determine the officers who shall take part in the investigation record.

(b) The Superintendent, after examining and analyzing the record, and after giving the defendant an opportunity to be heard, shall decide the case either by acquitting the defendant or by imposing the punishment he deems advisable as provided in subdivision (d) of this section. If the member or members of the Force are found guilty, the Superintendent shall deliver a copy of the document to the defendant, containing his decision, which shall be evidenced by his signature and by indicating the date and time of notice as proof thereof. The procedure to be followed in these cases shall be determined by regulation.

(c) The charges for serious shortcomings shall be preferred in writing and signed by the Superintendent.

(d) The penalty to be imposed for serious shortcomings shall be one of the following: permanent expulsion from the Force, demotion or suspension from the Force, without pay, for a period of not more than five (5) months.

(e) The Superintendent shall be authorized to suspend temporarily from work and pay any Force member while an investigation is being carried out for incompetence, misconduct or crime of which said member of the Force is accused. In such case, the Superintendent shall see that the corresponding charges be preferred without undue delay. He shall investigate and decide such cases within the shortest possible time, imposing whatever punishment he deems reasonable within the limits thereof or providing that his reinstatement in the service with or without back pay during the suspension period, if in his judgment the facts so justify it.

(f) When a member of the Force is suspended from work and pay, for any reason, he shall be unable to exercise his functions as such. Nor shall he enjoy the rights and privileges which by law are granted to the members of the Police while such suspension lasts.

(g) In all such cases where penalties are imposed which entail the suspension of employment and salary, the Superintendent, at defendant's request, may condone said penalty by additional services to the Corps equivalent to the time the suspension lasts.

(h) Every Police member against whom an adverse decision is rendered by the Superintendent, may appeal before the Investigation, Prosecution and Appeal Committee created under sections 171-185 of Title 1, before which he may have a hearing pursuant to the terms of said section. The appeal shall be filed within 15 days after receiving notice of the punishment—Aug. 22, 1974, No. 26., Part 2, p. 671, §14, eff. 90 days after Aug. 22, 1974.

VII. Regulations Of The Puerto Rico Police
Approved April 21, 1976
Article XI Procedure In Dealing With Faults

Section 1: Procedure for Serious Faults

(a) Any member of the Police who, in the judgment of the Superintendent, commits a serious fault will be permanently expelled, degraded or suspended from the Force without pay, for a period of no more than five (5) months.

(b) The Superintendent will have the authority to temporarily suspend from employment and salary any member of the Force during any investigation that is ordered concerning incompetency, improper conduct or a crime of which a member of the Force is accused. In such a case the Superintendent will make sure that the corresponding charges are made without any unnecessary delay. He will investigate and resolve such cases in the shortest time possible, imposing the punishment that he esteems reasonable within the limits of his authority. The Superintendent may allow such a member to continue his duties with or without his salary, if in his judgment, the case so merits it.

(c) The investigation file of every serious charge will include a complete report of the accusations made against the accused member or members of the Force. The investigation process and remittance of the file will be done without unnecessary delay. At the start of any administrative investigation, the Investigator will inform the accused of the accusation made, of the right to testify or not, that if he testifies it may be used against him, of his right to legal assistance and that he may request from the Investigator a list of witnesses whom he may wish to be heard in his favor.

(d) The Superintendent will designate a permanent examinator to offer the accused the opportunity of be-

ing heard by presenting defense witnesses or confronting the accusers before final action is taken by the Head of the Department. It is understood that the fees incurred in presenting defense witnesses will be paid by the accused. The accused can refuse to appear, if he wishes, doing so in writing and with adequate legal advice giving the accused the opportunity of expressing his points of view in the matter concerned or even appearing with legal representation for a greater guarantee of his rights.

(e) The Superintendent, after examining and analizing (sic) the file and after assuring himself that the accused had the opportunity to be heard, will resolve the case, absolving the accused or imposing the punishment that he may deem reasonable. If the member of members of the Force involved are declared culpable, the Superintendent will send the accused a copy of his decision which will show the Superintendent's signature and indicate the date and hour of notification.

(f) When a member of the Force is suspended from employment and salary for whatever reason, he will not be allowed to perform his duties as such, neither will he be entitled to the rights and privileges which by law are given the members of the Force as long as his suspension lasts . . .

(i) Every resolution of the Superintendent permanently expelling, degrading or suspending from employment and salary for a period of no more than five (5) months any member of the Force, will be made in writing, notifying the member or members affected of the resolution as indicated below. The determination should contain the reasons on which the Superintendent bases his decision. The notification of the determination will always be made personally, when possible, by the Commanding Officer of the District where the accused lives or by his representative. . .

(k) Any such party affected by the determination of the Superintendent may appeal to the Investigating Processing and Appeal Commission within a period of fifteen (15) days from the date of the notification of the determination.

QUESTION PRESENTED FOR REVIEW

Whether the plaintiff in a civil rights action filed under 42 U.S.C. §1983 must allege bad faith on the part of the defendant in order to state a claim for relief.

STATEMENT OF THE CASE

The petitioner commenced this civil rights action in the District Court for the District of Puerto Rico in July of 1977. Petitioner claimed damages from respondent Astol Calero Toledo, the Superintendent of Police of the Commonwealth of Puerto Rico, and from the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico.[1] The case against the respondent was based on 42 U.S.C. §1983, with jurisdiction invoked under 28 U.S.C. §1331.

The claim against the respondent was for violation of the petitioner's substantive and procedural rights to due process of law in connection with his discharge from employment as a police officer. The allegations in his complaint set forth the following facts:

The petitioner had been employed since 1968 as a police officer in the Police Department of the Commonwealth of Puerto Rico. (Complaint, ¶4, A.2). Petitioner discovered that two other police officers had obtained false evidence and had offered it in evidence in a pending criminal prosecution. He reported this matter to his superior officer. (Complaint, ¶5, A.2-3). As a result of this report, the respondent transferred the petitioner

[1] The Commonwealth and the Police Department were dismissed and the petitioner did not appeal from that decision.

away from his normal duties and assigned him to the police academy with no investigative authority. (Complaint ¶7, A.3) However, an investigation by the Legal Division of the Police Department corroborated petitioner's accusations against the other officers, and exonerated him of any wrongdoing. (Complaint ¶8, A.3)

Subsequently, in April, 1976, the petitioner was subpoenaed by the defendant in the criminal case in question and he testified concerning the false evidence which had been offered by the two other police officers. (Complaint, ¶9, A.3) Thereafter, and as a result of the petitioner's court testimony, the respondent brought criminal charges against the petitioner for alleged wiretapping. (Complaint, ¶10, 11, A.3-4) The courts of Puerto Rico later found no probable cause for these criminal charges. (Complaint, ¶15, A.4).

On May 26, 1976, the respondent suspended the petitioner for the reason that he was under investigation. (Complaint, ¶12, A.4) On July 14, 1976, the respondent discharged the petitioner from his employment for violations of the Puerto Rico Police Regulations—contesting without basis the honesty, integrity and competence of other members of the force; and injurious, immoral or disorderly conduct. The discharge was effected without a hearing. (Complaint, ¶13, A.4) Petitioner specifically alleged that the discharge was based on the same factual allegations against him which had been investigated by the Legal Division of the Police Department and in connection with which petitioner had been exonerated. (Complaint, ¶14, A.4) Petitioner subsequently appealed the discharge to the Investigation, Prosecution and Appeals Commission (C.I.P.A.) and on December 1, 1976, the commission ordered his reinstatement with back pay. (Complaint, ¶16, A. 4-5)

Petitioner alleged that his discharge without hearing was in violation of Puerto Rican law, Act No. 26, of

1974 (25 L.P.R.A. 1001, et seq.), which requires a hearing prior to discharge. Petitioner thus claimed a violation of his constitutional right to procedural due process of law, and also alleged that the discharge violated his rights not to be arbitrarily discharged from public employment. (Complaint, ¶17, A.5) As a result of the wrongful acts of the respondent, petitioner has suffered stress, anxiety, embarrassment and impairment to his reputation. (Complaint, ¶18, A.5)

Respondent filed a Motion to Dismiss, which was granted by the district court.[2] Petitioner appealed to the Court of Appeals for the First Circuit, which affirmed, holding that the plaintiff in an action under 42 U.S. C. §1983 must allege bad faith on the part of the defendant in order to state a valid cause of action.

SUMMARY OF ARGUMENT

In an action under 42 U.S.C. §1983 a plaintiff must meet only two requirements in the complaint to state a claim for relief. He must allege an act or omission which caused a violation of his constitutional rights, and he must allege that the violation was committed under color of law. A civil rights plaintiff need not allege that the violation was committed with specific intent, malice or in bad faith.

Qualified immunity is an affirmative defense which official defendants in §1983 actions may raise where they believed in good faith that the actions they took were lawful and where there is an objectively reasonable basis for such a belief. There is no defense of qualified

[2] Respondent had already filed his answer prior to his Motion to Dismiss. His motion should have been filed as a motion for judgment on the pleadings under Rule 12 (c) of the Federal Rules of Civil Procedure. Neither party filed affidavits and the motion was not treated as one for summary judgment under Rule 56.

immunity available where an official has violated a plaintiff's clearly established constitutional rights, as in this case. The burden of pleading qualified immunity in an appropriate case is on the defendants, as may be seen by the decisions of this Court and all of the courts of appeals, with the exception of the First Circuit. Indeed, even absolute immunity is an affirmative defense which must be pleaded by defendants.

Sound policy reasons support the placing of the burden of pleading qualified immunity on defendants who would claim it. The defense rests both upon the official's state of mind, his subjective belief that he acted legally, and upon the specific legal or other basis he had for his actions at the time he took them. Nearly all of the information required to determine the validity of the defense in any given case will be initially in the possession of the defendant. While a defendant may easily place this matter in issue, should he choose to rely on this defense, it would be nearly impossible for plaintiffs in most cases to gather sufficient facts prior to filing the complaint to negative all possible bases for qualified immunity on the part of the defendant. The plaintiff, however, may be required to respond to a defendant's assertion of qualified immunity in the context of summary judgment, if there are no disputed issues of fact relevant to the question.

In the instant case, the petitioner has pleaded violations of well established rights under the First and Fourteenth Amendments. Under Puerto Rican law, he had a clear entitlement to an evidentiary due process hearing prior to his discharge from his position as a police officer. Respondent discharged petitioner without such a hearing, and thus deprived him of property and liberty without procedural due process of law. Moreover, peti-

tioner's discharge was in retaliation for the exercise of protected speech and therefore a violation of his constitutional rights under the First Amendment.

Petitioner had no obligation in this case to plead bad faith on the part of the respondent in order to state a claim for relief under §1983. Therefore, the affirmance below of the granting of respondent's motion to dismiss on that ground should be reversed.

ARGUMENT

I. The Plaintiff In An Action Under 42 U.S.C. §1983 Need Not Plead "Bad Faith" On The Part Of The Defendant In Order To State A Claim For Relief.

A. Petitioner has alleged violations of his constitutional rights committed under color of law, thus stating a claim for relief under 42 U.S.C. §1983.

This case comes to this Court following the dismissal of the complaint by the District Court on the grounds that the complaint had failed to adequately state a claim for relief. In *Conley* v. *Gibson,* 355 U.S. 41 (1957), this Court indicated the narrow circumstances under which dismissal of the complaint is warranted.

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> *Id.*, at 45-46.

In response to the argument by the defendants in that case that the complaint had failed to set forth specific facts in support of a claim of discrimination, the Court held that such facts were unnecessary in the complaint. The Court specifically eschewed a technical view of the rules requiring artful and overly precise pleading:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.
>
> *Id.*, at 48.

This standard has been reaffirmed many times by this Court, including recently in a leading case on the qualified immunity of executive officers in suits under 42 U.S.C. §1983. *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974). The Court reiterated that the issue raised by a motion to dismiss is not whether the plaintiff will ultimately prevail, but only whether he is entitled to offer evidence to support his claims. *Id.*, at 236.

This Court has held that in order to state a claim under 42 U.S.C. §1983 the plaintiff must allege (1) an act or omission by a person causing a violation of plaintiff's constitutional rights, which was (2) committed under color of law. *Monroe* v. *Pape*, 365 U.S. 167 (1961). In the present case, petitioner pleaded that his right to procedural due process of law under the Fourteenth Amendment was violated when the respondent, Superintendent of Police, discharged him from his position as a police officer without the pre-termination hearing required to protect his property and liberty interests. Petitioner further alleged facts that established that his discharge was made in retaliation for speech protected under the First Amendment.[3] The complaint thus clearly

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[3] The constitutional rights at issue are discussed fully in Section II, *infra,* at pp. 40-51.

established that respondent deprived petitioner of constitutional rights under color of law and thereby stated a claim under §1983. For the reasons which follow, petitioner submits that no more was required of him in his initial pleading in this case.

B. The decisions of this court establish that qualified immunity is an affirmative defense which must be pleaded by the defendant in an action under 42 U.S.C. §1983.

In this case, the court of appeals held that petitioner's complaint was properly dismissed because it failed to make the allegation that respondent had acted maliciously or in bad faith. Petitioner's fundamental submission is that where a plaintiff alleges intentional acts which violated his constitutional rights no allegation as to the defendant's state of mind is required.[4]

Whether a plaintiff must allege that the defendant acted with a specific intent to violate his constitutional rights in order to state a claim under §1983 was decided by this Court in the landmark case of *Monroe* v. *Pape, supra*. The Court had earlier construed the statute imposing criminal penalties for violations of civil rights, 18 U.S.C. §242, which on its face punishes acts "wilfully" done, to require "a specific intent to deprive a person of a federal right" to sustain a conviction. *Screws* v. *United States,* 325 U.S. 91, 103 (1945). However, the Court ruled in *Monroe* v. *Pape* that no such specific intent was required in a civil case, holding:

[4] Because petitioner has alleged intentional acts by respondent, this case does not raise the question of whether a claim for relief under §1983 may be premised on negligent conduct. Cf., *Procunier* v. *Navarette,* 434 U.S. 555 (1978); *Baker* v. *McCollan,* _____ *U.S.* _____, *99 S. Ct. 2689 (1979).*

> Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.
>
> 365 U.S. at 187.[5]

The decision in *Monroe* v. *Pape* was reaffirmed in *Pierson* v. *Ray,* 386 U.S. 547 (1967), where the Court made clear that the requirements which the plaintiff must satisfy to state a claim under §1983 and the defenses available to officials in such suits are two different matters:

> We also held that the complaint should not be dismissed for failure to state that the officers had 'a specific intent to deprive a person of a federal

[5] Justice Frankfurter dissented in *Monroe* v. *Pape* on the basis of his reading of the phrase "under color of law." However, he was in complete agreement with the Court that no specific intent was required. He believed that the specific intent required under the criminal provision was far less strict than it appeared to be ("an abstraction serving the purposes of a constitutional need without impressing any actual restrictions upon the nature of the crime which the jury tries," *id.*, at 207), and that imposing a requirement of pleading intent in civil actions would be fruitless:

> But if intent to infringe 'specific' constitutional rights comes in practice to mean no more than intent without justification to bring about the circumstances which infringe those rights, then the consequence of introducing the specific intent issue into a litigation is, in effect, to require fictional pleading, needlessly burden jurors with abstruse instructions, and lessen the degree of control which federal courts have over jury vagaries.
>
> If the courts are to enforce §1979, it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. Specific intent in the context of the section would cause such embarrassment without countervailing justification. Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.
>
> *Id.*, at 207-208.

right,' but this holding, which related to the requirements of pleading, carried no implications as to which *defenses* would be available to police officers.

Id., at 556. (Emphasis supplied.)

Pierson v. *Ray* specifically held that the count of the complaint in question should not be dismissed.

Considerable elaboration of the good faith defense has occurred of course since the decision in *Pierson* v. *Ray,* both in this Court and in the lower federal courts. Nonetheless, proof of an official's good faith and assertion of qualified immunity from liability have consistently been treated as matters of defense both in this Court and by the vast majority of the lower federal courts.

In *Scheuer* v. *Rhodes, supra,* this Court reversed the dismissal of complaints alleging that an improper deployment of the National Guard had violated constitutional rights. The Court specifically held that the good faith of the defendants could not be taken for granted:

> In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed . . . The complaining parties are entitled to

> be heard more fully than is possible on a motion to dismiss a complaint.

Id., at 250-251.[6]

Scheuer v. *Rhodes* also makes clear that qualified immunity requires both an objective basis and the subjective belief of the official that his acts were lawful:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id., at 247-248.

It stands to reason that the burden of establishing the subjective element is on the defendant. Although the plaintiff may seek to impeach a defendant's claim of a good faith belief that his actions were lawful based on the conduct and statements of the defendant associated with the act in question, in most cases the only direct evidence of the defendant's state of mind will be his own testimony, whether by affidavit in a summary judgment motion or in the witness box at trial. Under *Conley* v. *Gibson, supra,* the plaintiff's allegation in the complaint that the acts of the defendant in fact did

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[6] The holding of *Scheuer* v. *Rhodes* that good faith cannot be assumed or judicially noticed is in direct conflict with the decision of the court below in the instant case. The court of appeals in this case held:

> Where, as here, a public official is being sued for action in his official capacity, it is assumed that he wears a cloak of qualified immunity and the complaint must allege and specify facts that show bad faith or state why in this particular case the cloak was shed.

602 F.2d at 1020.

violate his constitutional rights is enough notice of plaintiff's claim to fairly shift the burden to the defendant to come forward and claim that he believed that the actions he took were lawful, if he in fact chooses to make that defense.[7]

Wood v.*Strickland*, 420 U.S. 308 (1975), made clear that good faith alone is not sufficient to establish immunity, and that an act which violated a student's clearly established constitutional rights could not be justified on the basis of either ignorance or disregard of settled, indisputable law. The Court reversed the directed verdicts that had been granted by the district court on the ground of immunity, despite the district court's conclusion that there was no evidence of malice.

Here, as in *Wood* v. *Strickland,* the plaintiff's constitutional right to procedural due process was clearly established. Therefore, plaintiff was under no obligation to plead bad faith or malice. Moreover, the defendant's good faith, if he could prove it, would be insufficient to establish a defense of qualified immunity.

The most recent cases by the Court on the question of qualified immunity have continued to denominate the matter as one of defense. In *Procunier* v. *Navarette, supra,* both the majority opinion of the Court, *id.*, at

[7] Of course, a defendant may choose not to make a good faith defense. First, it may not be true that he considered the implications of his conduct for plaintiff's constitutional rights and believed that he was acting lawfully, or that he considered the legality of his acts at all. Second, even if the defendant honestly did act in good faith, he may decide as a tactical matter that his best defense lies in minimizing his participation in the conduct that led to plaintiff's claimed injuries rather than in calling attention to his role by explicitly offering testimony on the details of his state of mind. Whether or not to submit the question of good faith to a jury on the issue of liability should be within the control of the defendant in most cases.

566, and the dissenting opinion of Mr. Justice Stevens, *id.*, at 569, characterize qualified immunity as a defense. This Court had granted certiorari on that count of plaintiff's complaint which alleged that defendants had negligently interfered with his outgoing correspondence in violation of his constitutional rights. The defendants in the action had raised the defense of good faith, by filing a summary judgment motion with supporting affidavits. This Court then considered the issue of whether the plaintiff would be able to defeat the defense of good faith and concluded that he would not. This conclusion was based on two considerations. First, the constitutional right involved had not been clearly established at the time of the alleged interference with mail and thus qualified immunity could not be negatived on that branch of *Wood* v. *Strickland, supra.* Second, since the plaintiff had pleaded negligence in the count in question, he had ruled out the possibility of a malicious denial of his rights on the face of his own pleading. Of course, in a situation as here, where the complaint alleges intentional acts resulting in a constitutional violation, plaintiff is entitled to contest the defendants' claim of good faith with evidence to the contrary.[8]

[8] The court of appeals in *Procunier* had held that the counts in which malice was alleged by the plaintiff could not be resolved on summary judgment because there were issues of fact to be tried with respect to the good faith defense. The court reached this conclusion, however, not on the basis of the language in the complaints, but on the affidavits which the plaintiff Navarette had filed: "But here appellees' assertions that they acted in the good faith belief that they were complying with valid regulations are contradicted by Navarette's affidavits. This raised an issue of fact and precluded summary judgment." *Navarette* v. *Enomoto,* 536 F.2d 277, 280 (9th Cir. 1976).

Butz v. *Economou,* 438 U.S. 478, 502-503, 507 (1978) also labels qualified immunity as a defense. The Court made clear that the provisions for summary judgment in the Federal Rules of Civil Procedure are fully adequate to protect officials from frivolous lawsuits, even though they are clothed only with qualified immunity rather than shielded by absolute immunity. Complaints which fail to state a compensable claim for relief may, of course, be dismissed. *See, Baker* v. *McCollan, supra*[9]. However, once a claim for relief has been stated, it is the plaintiff's response to a summary judgment motion in which a defendant has raised claim of qualified immunity that will determine whether a case proceeds to trial, not the allegations in the complaint. *Id.,* at 508. Of course, this follows from the pertinent provisions of Rule 56(e) of the Federal Rules of Civil Procedure:

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[9] In *Baker,* this Court held there was no violation of the plaintiff's constitutional rights where his brief incarceration was based on a facially valid warrant. Evidence of bad faith on the part of the defendant would not have established liability under §1983, because no constitutional violation had occurred. The defendant prevailed, not because of any "good faith" on his part, but because the plaintiff had not established a constitutional violation. As the Court explained:

> In any event, before the relationship between the defendant's state of mind and his liability under §1983 can be meaningfully explored, it is necessary to isolate the precise constitutional violation with which he is charged. . . . The first inquiry in any §1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' If there has been no such deprivation, the state of mind of the defendant is wholly immaterial.
>
> *Id.,* at 2692.

The dissenting Justices were in agreement with this proposition, noting that the sheriff's good faith defense was not an issue presented in the case. *Id.,* at 2700 (Stevens, J., dissenting).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

It is apparent that a requirement that a plaintiff plead bad faith or malice in his complaint would be of little moment as a practical matter, because as soon as the defendant files a motion for summary judgment based on his good faith the plaintiff's complaint has no evidentiary value and affidavits are required.

Meritorious claims against officials with qualified immunity will require summary judgment proceedings or a trial to resolve disputed issues concerning the good faith defense. Indeed, this is the essential procedural difference between the defenses of absolute immunity and qualified immunity. In *Imbler* v. *Pachtman,* 424 U.S. 409, 424-428 (1976), the Court held that prosecutors were entitled to absolute immunity in order to accord them special protection from the procedural requirements of the qualified immunity defense. Mr. Justice Powell articulated the difference between the two forms of immunity:

> The procedural difference between the absolute and qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.
>
> *Id.,* at 419, fn. 13.

An official defendant with only qualified immunity must come forward with evidence to establish his subjective good faith belief that his acts were lawful, and evidence of the reasonable basis for the belief. The decision to accord prosecutors absolute immunity in *Imbler* v. *Pachtman* was based on the perception that they would "face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials." *Id.*, at 425.

Moreover, even though the immunity, if properly asserted, of certain officials is absolute, it is still a matter of defense, and has traditionally been referred to as a defense by this Court. *Barr* v. *Mateo,* 360 U.S. 564, 569 (1959). Resolution of absolute immunity cases involves two questions. First, is the official defendant in general entitled to absolute immunity? Second, do the particular facts and circumstances of the case in question involve acts performed by the official within the scope of his immunity? The law is now settled that several types of officials are, in general, entitled to an absolute immunity from suit. Thus, judges, *Pierson* v. *Ray, supra;* prosecutors, *Imbler* v. *Pachtman, supra;* legislators, *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); and certain executive department officials whose functions partake of judicial or prosecutorial character, *Butz* v. *Economou, supra,* have absolute immunity from suit under §1983 for acts performed within the scope of their immunity.

However, when an official whose position has not previously been recognized as affording him absolute immunity asserts immunity as a defense in a civil action, the burden is on the official to justify the claim. In *Butz* v. *Economou, supra,* the Court concluded that in light of the principle that all officers of the government are creatures of the law and bound to obey it:

> federal officials who seek absolute exception from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.
>
> *Id.*, at 506.

In cases where the general right of the official to absolute immunity is clear, a question may still arise as to the scope of the immunity. Although some such cases may be decided on the basis of the plaintiff's complaint,[10] in others this Court has indicated that a fuller evidentiary development of the issue is required.

For example, in *Doe* v. *McMillan,* 412 U.S. 306 (1973), the issue was whether the Public Printer and the Superintendent of Documents had absolute immunity under the Speech and Debate Clause for printing and distributing allegedly libelous legislative materials to the public. The Court held that such defendants had no "automatic immunity" and were obliged "to respond to private suits to the extent that others must respond in light of the Constitution and applicable laws." 412 U.S. at 316. The Court held that it had been error to dismiss the complaint on "threshold immunity grounds" *id.*, at 318, and remanded the case for further proceedings. In so doing, the Court noted that factfinding would be required on the question of the extent of the publication and distribution of the report in question in order to determine whether the legitimate legislative needs of

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[10] In some cases of a claim of judicial immunity, it is very likely that the matter can be disposed of on the basis of the complaint alone, since the only issue is whether the defendant judge had jurisdiction over the subject matter before him at the time he took the challenged action, a question of law. *Stump* v. *Sparkman,* 435 U.S. 349 (1978).

Congress, and thus the immunity of the defendants, had been exceeded. *Id.*, at 324-325.[11]

In *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), summary judgment in favor of the counsel of a Senate committee was reversed to determine if the attorney had acted beyond the limits of the protection afforded by the Speech and Debate Clause by collaborating with local officials to deny the plaintiff's rights. The Court held that "the factual refinement which can occur only as a result of trial," *id.*, at 84 was required in order to decide the issue. See, also, *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency,* _____ U.S. _____, 99 S.Ct. 1171 (1979).

Any immunity is an exception to the principle that public officials are liable under §1983 for violations of constitutional rights. The cases just discussed demonstrate that even those officials clothed with absolute immunity have the burden of establishing their defense. It follows, therefore, that officials with only a qualified immunity must plead and prove the elements of the defense.

[11] The matters which the Court indicated were relevant to final determination of the absolute immunity issue in *Doe* v. *McMillan* were facts in the possession of the official defendants and to which they had much greater and easier access than the plaintiffs in that case. Absent an opportunity for discovery, the plaintiffs might well have had no opportunity for acquiring the necessary information and therefore no basis for pleading that there was no absclute immunity. Rule 11, Federal Rules of Civil Procedure.

C. All of the Courts of Appeals except for the First Circuit place the burden of pleading qualified immunity on the defendant.

Only the First Circuit Court of Appeals has held that the plaintiff in a §1983 case has the burden of pleading bad faith or malice on the part of the defendant in the complaint. Every other circuit has held that the burden of pleading and/or proving good faith is on the defendants in such cases. In the leading case of *Skehan* v. *Board of Trustees of Bloomsburg State College,* 538 F.2d 53 (3d Cir., *en banc,* 1976), cert. denied 429 U.S. 979 (1976), a discharged state college teacher had filed suit under § 1983 for failure to receive a hearing prior to his termination. The court considered the question of which side has the burden of going forward with evidence and which side has the burden of proof with regard to the issue of qualified immunity. Analyzing the issue in the light of this Court's decisions in *Wood* v. *Strickland, supra,* and *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975), the court squarely held:

> We therefore hold that in §1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of *Wood* v. *Strickland,* official immunity should attach.
>
> 538 F.2d at 61-62.

See, also, *Safeguard Mutual Insurance Co.* v. *Miller,* 472 F.2d 732 (3d Cir. 1973); *Thompson* v. *Burke,* 556 F.2d 231, 239 (3d Cir. 1977).

Probably the most frequently cited lower federal court case on the subject of the good faith defense in

§1983 actions is *Bivens* v. *Six Unknown Named Agents,* 456 F.2d 1339 (2d Cir. 1972). After deciding that federal police agents have no absolute immunity from suit for constitutional deprivations, the court held that such officers do have a defense of good faith:

> And so we hold that it is *a defense to allege and prove* good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.
>
> *Id.,* at 1348. (Emphasis supplied.)

See, also, *Laverne* v. *Corning,* 522 F.2d 1144 (2d Cir. 1975).

Decisions from the other circuit courts of appeals are in harmony. *See, McCray* v. *Burrell,* 516 F.2d 357, 370 (4th Cir., *en banc,* 1975), cert. dismissed as improvidently granted, 426 U.S. 471 (1976); *Bryan* v. *Jones,* 530 F.2d 1210, 1213 (5th Cir., *en banc,* 1976), cert. denied, 429 U.S. 865 (1976); *Reimer* v. *Short,* 578 F.2d 621 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979);[12] *Glasson* v. *City of Louisville,* 518 F.2d 899,

[12] In *Cruz* v. *Beto,* 603 F.2d 1178 (5th Cir. 1979), the court stated that the plaintiff in a case against the director of a statewide prison system would have the ultimate burden of proof, once the defendant had placed good faith in issue. The opinion did not address itself to pleading requirements. The *en banc* opinion of the Fifth Circuit in *Bryan* v. *Jones, supra,* held that the plaintiff need not make out the absence of good faith in order to establish a prima facie case. Subsequent to *Cruz* v. *Beto,* the Fifth Circuit has ruled that where a plaintiff's constitutional rights were clearly established at the time of the act complained of, a lack of bad faith on the part of the defendant is unrelated to the determination of liability. *McNamara* v. *Moody,* 606 F.2d 621, 625-626, fn. 9 (5th Cir. 1979). *See,* also, *Reeves* v. *City of Jackson,* 608 F.2d 644, 650-651 (5th Cir. 1979). In addition, it might be noted that the opinion in *Cruz* v. *Beto* distinguishes between a high level official such as the director of a statewide prison system and lower officials such as police officers with regard to the allocation of the ultimate burden of proof on the issue of good faith. 603 F.2d at 1184. Whether or not all official defendants have the same scope of official immunity or whether the allocation of the ultimate burden of proof, or risk of non-persuasion, should be the same in every §1983 case, are issues which this Court need not and probably should not decide in connection with the instant matter. *Scheuer* v. *Rhodes, supra,* at 249.

907-910 (6th Cir. 1975), cert. denied, 423 U.S. 930 (1975); *Jones* v. *Perrigan,* 459 F.2d 81 (6th Cir. 1972); *Tritsis* v. *Backer,* 501 F.2d 1021 (7th Cir. 1974); *Brubaker* v. *King,* 505 F.2d 534 (7th Cir. 1974); *Boscarino* v. *Nelson,* 518 F.2d 879 (7th Cir. 1975); *Foster* v.*Zeeko,* 540 F.2d 1310 (7th Cir. 1976); *Landrum* v. *Moats,* 576 F.2d 1320, 1329 (8th Cir. 1978), cert. denied, 439 U.S. 912 (1978); *Gilker* v. *Baker,* 576 F. 2d 245 (9th Cir. 1978); *Donovan* v. *Reinbold,* 433 F.2d 738, 739 (9th Cir. 1970); *Martin* v. *Duffie,* 463 F.2d 464 (10th Cir. 1972); *Dellums* v. *Powell,* 566 F.2d 167, 176 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); *Apton* v. *Wilson,* 506 F.2d 83 (D.C. Cir. 1974); *Zweibon* v. *Mitchell,* 516 F.2d 594, 670-671 (D.C. Cir. 1975), cert. denied 425 U.S. 944 (1976); *In re: Zweibon,* 565 F.2d 742 (D.C. Cir. 1977)

This impressive weight of authority demonstrates that the lower federal courts, with the singular exception of the First Circuit Court of Appeals, have concluded that the burden of pleading the good faith defense is on the official defendants in actions under §1983.

D. The court below incorrectly considered proof of bad faith as an element of petitioner's claims for relief under 42 U.S.C. §1983.

The Court of Appeals below held that because public officials enjoy qualified immunity from suit under §1983, "it follows that a plaintiff must allege as well as prove that a public official acted in bad faith to state a valid cause of action." 602 F.2d at 1020. The decision in this case follows a long line of First Circuit decisions holding that the plaintiff in an action under §1983 has the burden of alleging and proving bad faith on the part of an official defendant. *Kostka* v. *Hogg,* 560 F.2d 37 (1st Cir. 1977); *Stadium Films* v. *Baillargeon,* 542 F.2d 577, 579 (1st Cir. 1976); *Gaffney* v. *Silk,* 488 F.2d 1248 (1st Cir. 1973); *Harrison* v. *Brooks,* 446 F.2d 404 (1st Cir. 1971); *City of Boston* v. *Massachusetts Port Authority,* 444 F.2d 167 (1st Cir. 1971); *Cobb* v. *City of Malden,* 202 F.2d 701 (1st Cir. 1953).

The First Circuit rule requires the plaintiff to allege and prove subjective bad faith on the part of the defendant, even if there is no objective basis for a claim of good faith by the official. This is obvious from the result below, where the denial of procedural due process was in violation of petitioner's settled constitutional rights.[13] Moreover, in *Gaffney* v. *Silk, supra,*[14] one of the principal cases relied upon by the Court of Appeals

[13] See discussion *infra* at pp. 40-46.

[14] *Gaffney* v. *Silk* was also a procedural due process case, in which the plaintiff had alleged the termination of disability benefits without a hearing. The Court required an allegation of bad faith, although it recognized that termination of benefits without a hearing violated the plaintiff's federally protected rights under *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

below, 602 F.2d at 1020, the First Circuit specifically noted the possibility of measuring good faith either by objective or subjective criteria and went on to say:

> it is the clear rule in this circuit that liability will attach only where 'the defendants subjectively realized [that their action] would result in depriving the plaintiff of a right or privilege secured by the Constitution of the United States.'
>
> 488 F.2d at 1281 (citing *Cobb* v. *City of Malden, supra,* at 707).

Application of the strict requirements of the First Circuit rule would make it all but impossible to establish liability in most cases. Petitioner has alleged that he could not be fired except for just cause, that he was entitled by local law to a pre-termination hearing and that the respondent failed to provide a hearing prior to dismissal. It is difficult to imagine what more could be adduced to establish that the denial of his due process rights was made in "bad faith." Apart from rare cases where direct evidence might exist of an employer's malicious statements against an employee, the First Circuit rule would make it exceedingly difficult to establish any liability under §1983.[15] It may readily be seen that this rule does "deny much of the promise of §1983." *Wood* v. *Strickland, supra,* at 322.

The rule in the First Circuit has developed, at least in part, due to a serious misreading of this Court's deci-

[15] This was candidly recognized by Judge Magruder in *Cobb* v. *City of Malden, supra* at 707 (concurring opinion), when he wrote: "I don't suppose for a moment that plaintiffs will be able to establish what it is necessary for them to show in order to recover damages."

sion in *Snowden* v. *Hughes*, 321 U.S. 1 (1943). In that case, a candidate for state office who alleged that he had been illegally denied his seat presented both due process and equal protection violations in his complaint. The Court held that there was no constitutional due process violation because only state law had been violated. The Court went on to discuss the equal protection violation, and concluded that a cause of action had not been established because the plaintiff had not demonstrated intentional or purposeful discrimination.

In *City of Boston* v. *Massachusetts Port Authority, supra,* the plaintiff sued for the diminished value of public school property due to airport noise. Only a due process claim was raised. Nevertheless, the court's opinion cited *Snowden* v. *Hughes, supra,* for the mistaken general proposition that a showing of purposeful discrimination was necessary "in order to raise a claim under the Fourteenth Amendment." 444 F.2d at 169. Thus it would appear that the court misapplied the intent and purpose required to establish a claim under the Equal Protection Clause to the issue of what is required to establish other Fourteenth Amendment violations. See, also, *Harrison* v. *Brooks, supra,* at 407.

Snowden v. *Hughes, supra,* like the recent cases of *Washington* v. *Davis*, 426 U.S. 229 (1976), *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977) and *Estelle* v. *Gamble*, 429 U.S. 97 (1976), reflect the fact that there are causes of action under 42 U.S.C. §1983 where this Court has held that the plaintiff must make a showing which in some respect involves the defendant's state of mind. These cases, however, are readily distinguishable from the instant matter and from other §1983 actions in which the defendant's state of mind is irrelevant to the substantive constitutional law.

In *Washington* v. *Davis, supra,* and *Arlington Heights* v. *Metropolitan Housing Corp., supra,* this Court held that discriminatory purpose or intent is an essential element of an equal protection violation. The Court held that proof of the discriminatory impact of an official policy was not sufficient to establish an equal protection violation. *Id.*, at 239. The evil prohibited by the Constitution, these cases make clear, is not that people may be treated differently by policies or laws which are neutral on their face. The essence of the constitutional violation is the conscious implementation of policy which leads to invidious discrimination against a citizen or group.

Moreover, even in equal protection cases, the precise requirements of a prima facie case will vary somewhat from issue to issue. In addition, the nature of the evidence required to show the requisite intent will depend greatly on the facts and circumstances of each case. *Arlington Heights* v. *Metropolitan Housing Corp., supra,* at 265-271; *Washington* v. *Davis, supra,* at 252-254 (Stevens, J., concurring). In any individual case, much of this evidence will not be available to a plaintiff until after discovery has been completed. Thus even where the plaintiff ultimately must prove discriminatory intent, it would be unrealistic to demand that all of the pertinent facts from which intent might be inferred be set forth in the complaint.

In *Estelle* v. *Gamble, supra,* this Court held that in order to prove a violation of the Eighth Amendment, a prisoner denied medical attention must establish deliberate indifference to his serious medical needs. This is because the Eighth Amendment only proscribes cruel and unusual punishments. A denial of medical attention only becomes cruel and unusual when done with some

degree of recklessness or malice. As in the equal protection cases, proof of the defendant's state of mind is required by the nature of the substantive right being enforced.

In contrast to these cases, the constitutional violations in the instant case do not depend in any way upon proof of the defendant's state of mind as a matter of substantive law. Malice is not required where a plaintiff's clearly established procedural due process rights have been violated. *Wood* v. *Strickland, supra.* In *Carey* v. *Piphus,* 435 U.S. 247 (1978), students had been suspended from school without a hearing. The district court specifically found that the school officials did not act with a malicious intention to cause a deprivation of constitutional rights or other injury to the students, and that they had acted with the belief that they were protecting the integrity of the education process. *Id.,* at 251-52, fn. 6. Nonetheless, the Court held that the students had been deprived of their rights to procedural due process. *Id.,* at 263-65. Although the absence of bad faith might bar an award of punitive damages, *id.,* at 275, fn. 11; *Carey* holds that it is no bar to an award of nominal damages or compensatory damages for mental and emotional distress. Similarly, proof of bad faith is not required to establish a violation of First Amendment rights.[16]

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[16] Proof of a First Amendment violation in connection with the termination of public employment under *Mt. Healthy City School District* v. *Doyle,* 429 U.S. 274 (1977), is discussed *infra,* at pp. 48-49.

E. Defendants must have the burden of pleading official immunity, because the information on which the defense is based is uniquely within their control.

Sound police reasons support the conclusion that qualified immunity is an affirmative defense which must be pleaded by the defendants under Rule 8(c) of the Federal Rules of Civil Procedure. First, the good faith defense is a matter of confession and avoidance. The defense comes into play only when a constitutional violation has been established. At that point judicially created immunity protects the official from liability in money damages for policy reasons which in no way contradict the plaintiff's claim that his rights have been violated. Such an exemption from liability in damages is a classic example of what constitutes an affirmative defense under the rule. As Judge (then Dean) Charles E. Clark, the Reporter for the original Advisory Committee, has stated:

> It seems to be considered only fair that certain types of things which in common law pleading were matters in confession and avoidance—i.e., matters which seemed more or less to admit the general complaint and yet to suggest some other reasons why there was no right—must be specifically pleaded in the answer, and that has been a general rule. Proceedings, Washington and New York City Institutes on the Federal Rules, 1939. p. 49.[17]

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[17] In this respect the qualified immunity defense is analytically similar to the defense of "qualified privilege" to a slander suit, a matter which must be raised by the defendant in the answer. See, e.g., *White* v. *Chicago, Burlington and Quincy Railroad,* 417 F. 2d 941, 946 (8th Cir. 1969).

Second, lower federal court cases in which defendants have asserted qualified immunity amply demonstrate that practical realities dictate considering the matter as an affirmative defense. The variety of justifications which have been put forward by defendants to avoid liability for constitutional violations is extremely wide. It would be impossible for plaintiffs to anticipate or investigate prior to filing the complaint all of the potential sources of a defendants' belief that his actions were lawful. See, *McCray* v. *Burrell, supra,* at 370-371.

Defendants may rely upon state law or local ordinances, *Traylor* v. *City of Amarillo,* 492 F. 2d 1156 (5th Cir. 1974); a state court order, *Wright* v. *Florida,* 495 F. 2d 1086 (5th Cir. 1974); the generally uncertain state of the law, *Laverne* v. *Corning, supra,* at 1150; the advice of counsel, *Crowe* v. *Lucas,* 595 F.2d 985, 992 (5th Cir. 1979), *Dellums* v. *Powell, supra,* at 185-186; administrative practice, *Mukmuk* v. *Commissioner of the Dep't of Correctional Services,* 529 F.2d 272, 275 (2d Cir. 1976); police department manuals, *Landrum* v. *Moats,* 576 F.2d 1320 (8th Cir. 1978); the unwritten practice of a police department, *Thompson* v. *Anderson,* 447 F.Supp. 584 (D. Md. 1977); long standing custom, *Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973).[18]

Such asserted justifications for unconstitutional actions are clearly "matters on which much of the relevant evidence will be possessed exclusively by the officials themselves." *Apton* v. *Wilson,* 506 F.2d 83, 95 (D.C.

[18] The above cases are not cited because petitioner necessarily agrees that the claim of qualified immunity was well taken in each case, but merely in order to demonstrate the variety of claims official defendants have made.

Cir. 1974). For example, the issue in determining a defendant's good faith is not merely whether there existed a state statute on which he might have relied, but whether he actually did rely on such a statute and whether, under the facts of the case as known to him at the time, it was reasonable for him to believe the statute applied to the situation at hand. *Fidtler* v. *Rundle,* 497 F.2d 794, 801-802 (3d Cir. 1974).

Similarly, where the official's defense is reliance on the advice of counsel, plaintiff would, absent discovery, have no way of knowing whether such advice had been sought. Moreover, the circumstances under which advice is sought, including what information the defendant furnished to his attorney, may be critical in determining whether the defendant really acted in good faith. *Dellums* v. *Powell, supra.* See, also, *Martin* v. *Duffie, supra* (plaintiff not required to negative all possible sources of probable cause for warrantless arrest to establish prima facie case). These cases demonstrate that basic considerations of fairness, as well as practical realities of trial practice, compel the conclusion that defendants must have the burden of pleading and proving the qualified immunity defense.

II. Petitioner Has Alleged Violations Of Clearly Established Constitutional Rights Under The First and Fourteenth Amendments

Petitioner's complaint alleges violations of two significant, well-established constitutional rights. First, he was denied his right to procedural due process under the Fourteeenth Amendment when respondent deprived him of his property right to his employment and of his liberty, by discharging him without a pre-termination hearing. Second, petitioner was deprived of his right under the First Amendment to be free from retaliatory

discharge based on protected speech. We address these issues in turn.[19]

A. The discharge of petitioner without a prior hearing was a deprivation of property and liberty without due process of law

At the time of his dismissal from the police force, petitioner was a permanent employee under the laws of Puerto Rico and could lawfully be discharged only for cause and only *after* a due process hearing. To understand the basis for petitioner's fundamental entitlement to a pre-termination hearing, it is important first to discuss the development of Puerto Rican law establishing the rights of police officers to be free from summary and arbitrary discharges.

Prior to the passage of The Puerto Rico Police Act of 1974, Act No. 26 of 1974, 25 L.P.R.A. §1001, et seq. (hereinafter "Act No. 26"), there was no right to a pre-discharge hearing. The former statute, 25 L.P.R.A. §221(j)(k), empowered the Superintendent of Police to discharge any officer for a "serious shortcoming" and provided the employee with a post-termination hearing only if he perfected an appeal within ten days of

[19] Our discussion of the substantive constitutional issues in this case is not meant to suggest that they are ripe for decision at this time. To the contrary, it should be noted that neither of the courts below has passed on these issues, and, as the discussion below will make clear, their resolution may turn on factual matters that must await discovery and trial. The purpose of this discussion is to provide a contextual framework for our argument that petitioner had no burden to plead respondent's bad faith, by demonstrating that petitioner alleges *prima facie* violations of well-settled constitutional rights.

discharge.[20] Act No. 26 made a fundamental change in this statutory scheme, by providing that discharge can only be effected "*after*" one has had the "opportunity to be heard." 25 L.P.R.A. §1014(b) (emphasis supplied).[21]

Act No. 26 does not, by its own provisions, describe the details of the hearing required, but it directs the Superintendent of Police to promulgate regulations to establish hearing procedures. 25 L.P.R.A. §§ 1007, 1014(b). Respondent Toledo, Superintendent of Police, personally promulgated the applicable regulations, which became effective June 20, 1976, nearly one month before the discharge of petitioner.[22] These regulations

[20] At this post-termination hearing, an employee was entitled to the full panoply of due process protections, including notice of charges, opportunity to respond by offering evidence, right to cross-examine adverse witnesses, assistance of counsel and to a decision supported by sufficient evidence. See, e.g. *Lavergue* v. *Police Commission*, 27 P.R.R. 758 (Supreme Ct. 1919); *Lopez* v. *Tugwell, Governor*, 62 P.R.R. 471 (Supreme Ct. 1943).

[21] Act No. 26, 25 L.P.R.A. §1002 provides that probationary officer ("Cadets") must complete two years of duty before they become permanent employees ("Guardsman" or some higher rank). Under §1008, a probationary employee may be discharged upon the judgment of the Superintendent that he lacks "the aptitude to be a police member, or his habits and reliability do not warrant his continuation in the Corps."
No such power for summary removal exists with regard to permanent employees who can only be discharged for cause and after a full due process hearing. Petitioner is a permanent employee under this statute, having been employed for eight years at the time of his discharge (Complaint, ¶4, A. 2).

[22] Act No. 26, 25 L.P.R.A. §1007 provides that the Regulations were to take effect sixty days after they were signed by the Governor. The Regulations were approved and signed by Rafael Hernandez Colon, Governor of Puerto Rico, on April 21, 1976. Peti-

provide in detail for a pre-termination due process hearing that affords an employee accused of a "serious fault" substantial protections.[23]

The Regulations contemplate that an Investigator will commence the process by advising the employee of the accusation made against him, of his right to testify or not, of the fact that any testimony given may be used against him, of his right to legal assistance and of his right to obtain a list of the witnesses developed by the Investigator in the event he wishes to call any of them in his favor (Article XI, Sec 1c). A hearing is then held before a permanent examiner, who affords the employee the right to offer witnesses and to confront the witnesses against him. The employee may appear in person or in writing and has the right to be represented by counsel. (Article XI, Sec. 1d).

The Superintendent then makes his decision, "after examining and analizing (sic) the file and after assuring himself that the accused had the opportunity to be heard." (Article XI, Sec. 1e). Thus, whatever question might be raised concerning the meaning of the term "opportunity to be heard" as set forth in Act No. 26, respondent, under this Act, has provided specific, unambiguous content to that protection: opportunity to be heard means a full panoply of due process protections, prior to termination from employment.[24]

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tioner requests the Court to take judicial notice of these Regulations. A copy of the pertinent portions of the Regulations will be submitted to the Clerk of this Court.

[23] The pertinent portions of the Regulations are set forth at pp. 6-8 of the brief.

[24] This phrase is the lynchpin of procedural due process and has been invoked as a kind of shorthand by this Court in a variety of cases ordering due process protections. See, e.g., *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914); *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162 (Frankfurter, J., concurring). Given this established judicial gloss to the term "opportunity to be heard," it can hardly be doubted that in using this phrase the Legislature of Puerto Rico meant to insure at least the rudimentary due process protections of notice, opportunity to testify and confrontation of adverse witnesses. In promulgating the regulations, Respondent surely understood this term to incorporate fundamental notions of due process.

The Regulations further provide a comprehensive listing of the 50 specific serious faults for which an employee may be discharged under 25 L.P.R.A. §§1012 and 1014. Just cause for terminations is thus spelled out in explicit and specific terms by these Regulations. Less severe misconduct ("slight shortcomings") is punishable by at most a ten day suspension and a written reprimand. 25 L.P.R.A. §1013.

In *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), this Court held that it is provisions of local law such as those embodied in Act No. 26 and the Regulations promulgated by Respondent which define property interests in employment for the purpose of determining when constitutional due process protections are required. Puerto Rican law clearly provided petitioner with a "legitimate claim of entitlement," *Board of Regents* v. *Roth, supra*, at 577, to continued employment in the absence of just cause for his discharge and compliance with the procedural requirements of the Regulations.[25]

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[25] The entitlement of an employee to continue employment need not be spelled out on the face of a statute to create a property right. In *Roth*, the Court noted that property rights are created by "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*, at 577. In *Perry* v. *Sindermann*, the Court held that the unwritten "common law"

Once it is clear that an employee has a property right in his government position, he is protected by the due process clause of the Fourteenth Amendment. In *Board of Regents* v. *Roth,* this Court stated that the Constitution requires a hearing prior to discharge where a public employee has such a property right:

> When protected interests are implicated, the right to some kind of prior hearing is paramount.[7]
>
> 7. Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut,* 401 U.S. 371. 'While "[m]any controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . ., it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' Bell v. Burson, 402 U.S. 535. (emphasis in original).

The petitioner in the instant case had the strongest possible claim on a pre-termination hearing. Not only does he have an absolutely clear right to continued employment in the absence of just cause for his dismissal, his right to a hearing prior to discharge is protected both by the Constitution and by local law.

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of a university community could create property rights even in the absence of a formal tenure system. *Id.*, at 602. It follows that officially promulgated regulations required by a statute provide a sufficient foundation for petitioner's claim of a property right.

The present situation is readily distinguishable from the result reached in *Bishop* v. *Wood,* 426 U.S. 341 (1976). The plaintiff in that case "held his position at the will and pleasure of the city," *id.,* at 345, both because he had no right to be free from discharge except for cause and no right to a hearing under state law. This Court held that the plaintiff simply had no property interest in his position and therefore rejected his claim of a right to a pre-termination hearing. The rationale of the case, however, reaffirms that where state law does prohibit termination except for cause and provides for procedural protections in a pre-termination hearing, the Fourteenth Amendment protects a government worker's interest in his employment status and a due process hearing is required before termination may be effected.

In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the statute which granted the plaintiff employee the right not to be discharged except for cause also limited his procedural rights prior to termination to notice of charges and an opportunity to appear before the decision-making official. An evidentiary hearing was not available under the statute until after discharge. Although that case presented a statutory scheme diametrically opposed to the statutes and regulations of Puerto Rican law, thus compelling the result that the employee was not entitled to a pre-termination hearing, the nature of the test employed in each of the separate opinions in *Arnett* leads to the conclusion that a hearing was required prior to the petitioner's discharge in this case.

All of the concurring and dissenting opinions recognized that the determination of the constitutional question of whether a hearing need be held prior to discharge involved a balancing test in which the Govern-

ment's asserted interests are balanced against those of the discharged employee. *Id.*, at 167-168 (Powell, J., concurring), *id.*, at 188 (White, J., concurring in part and dissenting in part), *id.*, at 212 (Marshall, J., dissenting). Although the six Justices represented by those opinions concluded that the government itself could not limit by statute the degree of due process required by the Constitution, it does not follow that the government may not limit its own definition of its asserted interests such that the balance tips in favor of requiring a pre-termination hearing. In the instant case, the legislature of Puerto Rico in Act No. 26 and the respondent himself in the Regulations, have already determined that they do not assert any interests in support of immediate discharge of employees sufficiently important to avoid a pre-termination hearing. Indeed, the statute and the Regulations were amended in 1974 precisely to provide for a hearing prior to discharge. Thus it is clear that in this case the constitutional line should be drawn under the general principles of *Board of Regents* v. *Roth, supra,* and in favor of a pre-termination hearing.

The plurality opinion of the Court in *Arnett, supra,* also compels the conclusion that petitioner in the instant matter was entitled to a hearing prior to discharge. Mr. Justice Rehnquist's opinion makes clear that the legislature which establishes the property right in employment may itself determine the level of constitutional due process protection which the right shall receive:

> Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The

> employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause. *Id.*, at 152.

The opinion rejects the notion of placing any "hobbling restrictions on legislative authority in this area." *Id.*, at 154.

In addition to the clear deprivation of petitioner's property rights without due process of law, the discharge alleged here also deprived petitioner of a protected liberty interest as well. He was discharged from his position as a police officer for *inter alia*, "injurious, immoral or disorderly conduct" in violation of the Regulations. (Complaint, ¶13, A. 4). This is clearly sufficient to implicate the loss of liberty involved when one's good name, reputation, honor or integrity are at state. *Board of Regents* v. *Roth, supra,* at 573. See, also, *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 185 (Jackson, J., concurring); *Willner* v. *Committee on Character,* 373 U.S. 96 (1963).[26]

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[26] In *Paul* v. *Davis,* 424 U.S. 693 (1976), this Court ruled that mere loss of reputation, without loss of any tangible benefit or violation of other constitutional right did not implicate the due process right to liberty. But *Paul* v. *Davis* is manifestly inapposite to this case where petitioner has been deprived of tangible property and liberty interests.
Petitioner alleges a wrongful discharge from employment in retaliation for his exercise of First Amendment rights, mental and emotional injuries related to a denial of procedural due process, loss of reputation, and stigmatization. Thus, it is clear that what one lower court has called the "stigma-plus" test of *Paul* v. *Davis* (loss of reputation and loss of tangible benefit or constitutional right) has been satisfied. *Dennis* v. *S & S Consolidated Rural High School District,* 577 F.2d 338 (5th Cir. 1978); *McKnight* v. *SEPTA,* 583

Petitioner has also alleged that respondent caused criminal proceedings to be initiated against him, proceedings which were admittedly terminated when the courts found no probable cause for the complaints. (Complaint, ¶¶10, 11, 15, A. 4; Answer, ¶15, A. 9). The record, of course, is incomplete in the absence of discovery or the taking of evidence with respect to the question of how widely these allegations against the petitioner were publicized. Petitioner, however, alleged embarrassment and impairment to his reputation in his complaint. (Complaint, ¶18, A. 5).

While it is true that a majority of the Justices of this Court have indicated that a post-termination hearing may be sufficient due process with regard to a deprivation of liberty caused by damage to reputation, *Arnett* v. *Kennedy, supra,* at 157 and at 171, fn. 6 (Powell, J., concurring), the situation presented in the instant case has never been before the Court. Where local law specifically provides for detailed procedures prior to termination, including a formal investigation and an evidentiary hearing, the decision to discharge an employee is cast in a rather different light than where no such procedures are provided. That is, to the extent the general public or co-workers are aware of the due process protections accorded government workers, discharge implies that the employee has already had the opportunity to "clear his name," *Board of Regents* v. *Roth, supra,* at 573, n. 12, *Arnett* v. *Kennedy, supra,* at 157, but has failed to do so.

F.2d 1229 (3d Cir. 1978); *Davis* v. *Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1968).

It should be clear, of course, that *Paul* v. *Davis* involved no First Amendment considerations, thus on that ground alone distinguishing the instant case where the allegations evidence a retaliatory discharge for exercise of free speech. See, *Perry* v. *Sindermann, supra.*

For this reason, petitioner submits that the failure to afford him a hearing in the present case prior to discharge was a denial of his procedural due process rights and that the subsequent administrative hearing which he was given was insufficient to protect those rights.

Carey v. *Piphus, supra,* makes manifest the compensable nature of petitioner's injuries as a result of the violation of his rights to due process of law. Petitioner claims that as a result of the abridgement of his due process rights he "has suffered and continues to suffer stress, anxiety, embarassment and impairment to his reputation" (Complaint ¶18, A. 5), injuries which *Carey* recognizes as compensable. Moreover, the deprivation of petitioner's procedural due process rights is compensable by nominal damages even should he be unable to prove actual injuries at trial:

> Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, see *Boddie* v. *Connecticut,* 401 U.S. 371, 375 (1971); *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring), we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified respondents nevertheless will be entitled to recover nominal damages no to exceed one dollar from petitioners.

Accordingly, based on explicit provisions of Puerto Rican law, petitioner had a legitimate claim of entitlement to continued employment, absent sufficient cause

for termination, and is entitled to damages for the violation of his right to a pre-termination hearing.

B. Petitioner's complaint states a claim for relief under the First Amendment by alleging that he was discharged in retaliation for an exercise of protected Speech.

The First Amendment prohibits retaliatory discharge from public employment for the exercise of speech protected by the First Amendment. See, e.g., *Perry* v. *Sindermann, supra; Board of Regents* v. *Roth, supra; Mt. Healthy City Board of Education* v. *Doyle, supra,* at 283-284 (1977); *Elrod* v. *Burns,* 427 U.S. 347 (1976); *Givhan* v. *Western Line Consolidated School District,* _____ U.S. _____, 99 S.Ct. 693 (1979); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Madison School District* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976). In *Perry* v. *Sindermann, supra,* this Court ruled that even when a public employee lacks a contractual or tenure right to his position, discharge or non-renewal caused by the government's retaliation for the exercise of First Amendment rights is actionable:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.
>
> *Id.*, at 597

There is a three step process for analyzing claims of retaliation against a public employee based on speech. First, the claimant must show that his or her expression was constitutionally protected. If the government argues that conflicting, legitimate state interests related to claimant's employment justify the termination, a balancing of the claimant's rights and the state's interests is required. A court must weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education, supra,* at 568; see *Givhan* v. *Western Line Consolidated School District, supra.* In this balance, only state interests "significantly greater than [the state's] interest in limiting a similar contribution by any member of the general public" can be substantial enough to outweigh the employee's right of expression. *Givhan, supra,* 99 S.Ct. at 696; *Pickering, supra* at 570, 572-573. Second, the claimant must show that the protected conduct was a substantial or motivating factor in the decision or action taken against him. Third, if claimant has met the first two requirements, the government employer can still defeat the claim by showing by a preponderance of the evidence, that the same action would have been taken even in the absence of the protected expression. *Givhan, supra,* 99 S.Ct. at 697; *Mt. Healthy, supra.*

Under this test, petitioner has pleaded a cause of action under the First Amendment.[27] *First,* petitioner's

[27] The specific, well-pleaded allegations of the Complaint set forth with more than ample particularity the factual basis for petitioner's First Amendment claim. Petitioner alleges facts that demonstrate the retaliatory nature of his discharge, and he explicitly complains that his "constitutional rights . . . not to be arbitrarily

speech—truthful criticism of public officials for the serious abuse of their powers—is a classic example of speech that comes within the protection of the First Amendment. See, e.g., *Givhan* v. *Western Line Cons. School District, supra; Pickering* v. *Board of Education, supra; Mount Healthy City School District* v. *Doyle, supra; New York Times* v. *Sullivan,* 376 U.S. 254 (1964); *Perry* v. *Sindermann, supra; Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

In *Perry* v. *Sindermann, supra,* at 598, this Court ruled that allegations that a teacher's non-retention was based on testimony before legislative committees and "other public statements critical of the Regents' policies" "present a bona fide constitutional claim." There are no distinctions in First Amendment terms that can be drawn between the speech at issue in *Sindermann* and that which is presented in the instant case, see *Givhan, supra,* and therefore petitioner has stated a claim for relief under the Constitution.

Second, it is clear that balancing of petitioner's free speech interests against the countervailing interests which might be asserted on behalf of the police department cannot be done on the bare pleadings of this case. There is absolutely no record upon which to base a determination of whether the respondent has any legitimate countervailing interest. There is no evidence upon which to make the determination of what impact

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discharged from public employment" were violated (Complaint, ¶17, A. 5). These allegations surely encompass a First Amendment claim, particularly for purposes of the pleading requirements of the Federal Rules. See, e.g., *Conley* v. *Gibson,* 355 U.S. 41 (1957); *Hickman* v. *Taylor,* 329 U.S. 495 (1947); *Hillsborough Township* v. *Cromwell,* 326 U.S. 620 (1946); *Southpark Square Ltd.* v. *City of Jackson,* 565 F.2d 338 (5th Cir. 1977).

the petitioner's speech might have had on morale within the police department or on public confidence in the department. Cf., *Pickering* v. *Board of Education, supra.* Nor is there any evidence of the impact of petitioner's speech on his relationships with his co-workers or with the respondent as his superior officer. In such circumstances, further factual development of the case is required. *Givhan* v. *Western Line Consol. School District, supra.*[28]

Third, there is no evidence on the record to suggest that petitioner was discharged for anything except the substantive content of his charges and criticisms.[29] At a minimum, therefore, under *Mt. Healthy,* the respondent would bear the burden of proving by a preponderance of the evidence that the discharge would have been effected even in the absence of the protected conduct. *Givhan, supra,* at 697; *Mt. Healthy, supra.*

Accordingly, petitioner's Complaint states a cause of action for a retaliatory discharge for First Amendment protected activity under well-settled law. Should he prevail on his First Amendment claim at trial, petitioner would be entitled to damages, even though he has already received back pay for the period of his discharge. Petitioner would be entitled to compensatory damages for any emotional or mental suffering he incur-

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[28] Indeed, to the extent the pleadings speak to this issue, it would appear from the fact that petitioner was reinstated to his former position that the government of Puerto Rico has explicitly acknowledged that any interests that could be asserted by the respondent are *not* sufficient to overcome petitioner's freedom of expression.

[29] To the extent petitioner's complaint can also be read to allege that he was discharged for testifying truthfully under subpoena for a defendant in a criminal case, his First Amendment claim is only strengthened.

red as a result of the denial of his First Amendment rights and nominal damages for the denial of the right, and he may be entitled to punitive damages as well. *Carey* v. *Piphus, supra; Donovan* v. *Reinbold, supra,* at 743; *Glasson* v. *City of Louisville, supra,* at 912.

III. Conclusion

For all of the foregoing reasons, petitoner requests this Court to reverse the decision of the First Circuit Court of Appeals affirming the dismissal of this action and to remand for further proceedings.

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